

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

PHILLIP McCAIN #1783648 §
v. § CIVIL ACTION NO. 6:13cv502
JODY HEFNER, ET AL. §

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Plaintiff Phillip McCain, proceeding *pro se*, filed this civil rights lawsuit under 42 U.S.C. §1983 complaining of alleged violations of his constitutional rights. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

McCain complains that in March of 2013, he was assaulted by an inmate named Rodriguez on 8 Building L Wing. He states that Rodriguez is a gang member and has threatened to assault him again, which places McCain in danger as long as he remains on 8 Building. McCain acknowledges that he has been moved to another pod and that a notation has been put in his records not to house him on the same pod as Rodriguez, but he contends that this is not sufficient to ensure his safety.

McCain says that he has not filed any other lawsuits concerning his imprisonment and that he has not been sanctioned by any courts as a result of lawsuits he has filed. As the Magistrate Judge observed, this is entirely untrue. In fact, McCain has filed over 100 lawsuits in the federal courts in the state of Texas, at least three of which have been dismissed as frivolous or for failure to state a claim upon which relief may be granted. *See McCain v. Scott, et al.*, slip op. no. 97-40912 (5th Cir., December 10, 1997). McCain has also incurred monetary sanctions totaling \$75.00 in two cases; in each of these cases, he was barred from filing any further cases until the sanctions were satisfied

or he received permission from the Court. *See McCain v. Scott*, civil action no. 6:97cv662 (E.D.Tex., June 22, 1997); *McCain v. Becraft*, cause no. 6:96mc212 (E.D.Tex., October 23, 1996). McCain has not shown that these sanctions have been satisfied nor that he received permission from the Court to file the present lawsuit.

After review of the pleadings, the Magistrate Judge issued a Report recommending that McCain's *in forma pauperis* status be revoked and that the lawsuit be dismissed. The Magistrate Judge observed that because McCain had filed at least three previous lawsuits or appeals which had been dismissed as frivolous or for failure to state a claim, he is subject to the provisions of 28 U.S.C. §1915(g). That statute provides that inmates who have filed at least three previous lawsuits or appeals which have been dismissed under 28 U.S.C. §1915(g) cannot proceed under the *in forma pauperis* statute unless they show that they are in imminent danger of serious physical injury.

In the present case, the Magistrate Judge concluded that McCain failed to show that he was in imminent danger of serious physical injury as of the time that the lawsuit was filed. The Magistrate Judge also observed that McCain failed to show that the sanctions imposed against him had been satisfied. Hence, the Magistrate Judge recommended that the lawsuit be dismissed.

McCain received a copy of the Magistrate Judge's Report on July 23, 2013, but filed no objections thereto; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. *Douglass v. United Services Automobile Association*, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has carefully reviewed the pleadings and documents in this case, as well as the Report of the Magistrate Judge. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge (docket no. 9) is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the Plaintiff Phillip McCain's *in forma pauperis* status is hereby REVOKED. It is further

ORDERED that the above-styled civil action be and hereby is DISMISSED with prejudice as to the refiling of another *in forma pauperis* lawsuit raising the same claims as herein presented, but without prejudice to the refiling of this lawsuit without seeking *in forma pauperis* status and upon payment of the statutory filing fee. It is further

ORDERED that should the Plaintiff pay the full filing fee within 15 days after the date of entry of final judgment in this case, he shall be allowed to proceed in the lawsuit as though the full fee of \$400.00 was paid from the outset. Such payment of the filing fee would not affect a frivolousness analysis, nor does it alter McCain's obligation to satisfy the sanctions imposed against him or to obtain permission from a judicial officer of the Court in order to proceed with his lawsuit. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So ORDERED and SIGNED this 30th day of August, 2013.

A handwritten signature in black ink, appearing to read "LEONARD DAVIS", is written over a horizontal line. The signature is fluid and cursive, with a large, stylized "L" at the beginning.

**LEONARD DAVIS
UNITED STATES DISTRICT JUDGE**